species of property, but also to freedom of contract in other than labor situations. The court should not declare unconstitutional this distinction between remedies for different classes of property, unless the classification is clearly arbitrary or unreasonable.[9] Whether this can be said in the case of the legislation now in question need not be finally decided here. It is sufficient to point out that a decision cannot be reached by trying to piece statute and Constitution together like a jig saw puzzle.[10] There is necessary a thoroughgoing study and appreciation of the facts, as well as of the policy sought to be enforced by the legislative act in question.[11] Only if after such investigation the court is still convinced that the classification is without reasonable basis should it declare the action of the legislature void. The unfortunate method of the statute, and perhaps insufficient pressing in argument of the social data, are undoubtedly responsible for the unsatisfying character of the decision that was rendered.

CONSTITUTIONALITY OF A TAX ON INCOME DERIVED FROM EXPORTS. — A recent case raises the question whether there are not certain sources of income, other than those specifically enumerated in the Federal Income Tax Law of 1913,[1] which are exempt from taxation. A corporation, whose business consisted largely in exportation, sought to recover such proportion of the corporate income tax as was paid on their export trade. They contended that it was an unconstitutional export tax,[2] but it was *held* that they might not recover. *Peck & Co.* v. *Lowe*, 55 N. Y. L. J. 981 (U. S. Dist. Ct., S. Dist. N. Y.). It is certainly arguable that a tax on net incomes, derived to a large extent from exporting, is a tax on exports. The question is a new and very close one, and can be approached only by analogy and analysis. It is clear that a tax on the various instrumentalities used in exporting is unconstitutional.[3] An income tax, however, attaches to the proceeds after the actual act of exportation is completed, and so the "instrumentalities" cases are not conclusive in

509, 91 N. E. 695; Miller *v.* Wilson, 236 U. S. 373; People *v.* Schweinler Press, 214 N. Y. 395, 108 N. E. 639; and Mr. Justice Holmes' dissent in Adair *v.* United States, 208 U. S. 161, 190.

[9] Hadacheck *v.* Sebastian, 239 U. S. 394, 413; Price *v.* Illinois, 238 U. S. 446, 452.

[10] For expressions of the line of approach insisted on, see Dean Pound's article, "Liberty of Contract," 18 YALE L. J. 454; the paper by Professor Frankfurter referred to in note 6; the discussion in 28 HARV. L. REV. 790; and an article by Professor Ernst Freund, "Tendencies of Legislative Policy," 27 INTERNAT. J. ETH. 1, 23–24.

[11] There should have been called to the attention of the court for instance the English Trades Disputes Act, 1906, 6 EDW. 7, c. 47, § 3, and the debates that preceded its enactment; also the Australian solution of the problem. See Judge Higgins, "A New Field for Law and Order," 29 HARV. L. REV. 13. Further discussion of value may be found in Gregory, "Government by Injunction," 11 HARV. L. REV. 487; Dunbar, "Government by Injunction," 73 L. QUART. REV. 347; Allen, "Injunctions and Organized Labor," 28 AM. L. REV. 878; Dean, "Government by Injunction," 4 GREEN BAG 540; Stimson, "The Modern Use of Injunctions," 10 POL. SCI. QUART. 189.

[1] 38 STAT. AT L. 166, 172.

[2] U. S. CONST., Art. I, sec. 9.

[3] Fairbank *v.* U. S., 181 U. S. 283; U. S. *v.* Hvoslef, 237 U. S. 1; Thames, etc. Ins. Co. *v.* U. S., 237 U. S. 19. But see Goodwin, "U. S. *v.* Hvoslef," 29 HARV. L. REV. 469, where the doctrine of these cases is harshly criticised.

the present instance. On the other hand, goods are not relieved from the burdens that rest on all property similarly situated merely because they are intended for subsequent exportation.[4] But it does not follow from this that the proceeds of such goods (after the exportation thereof) may be taxed as income. The cases dealing with taxes on gross incomes of corporations engaged in interstate commerce present a close analogy to the present situation. The various states may certainly tax the property of such corporations, along with other property within their territory,[5] but since Congress regulates interstate commerce under the Constitution, it becomes necessary to determine whether these gross income taxes are state taxes on the commerce itself, and hence unconstitutional. In these cases the courts, looking at the substance rather than at the form, have held them unconstitutional.[6] Wherever possible, however, they are sustained as license taxes for the privilege of doing business in corporate form,[7] and, in so construing, the courts desert the rule of substance and go almost entirely on the form of the particular statute — whether or not it declares the imposition of a license or excise tax.[8] Under this construction the Federal Corporate Income Tax of 1909 [9] was declared constitutional as an excise.[10] Such a rule of construction is unscientific and unsound,[11] but even under this theory the tax in the present case cannot be upheld as an excise; it must stand or fall as an income tax. It was passed after an amendment [12] to the Constitution, rendered necessary by the decision in the *Pollack Case*,[13] and intended to permit the

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[4] Coe *v.* Errol, 116 U. S. 517; Cornell *v.* Coyne, 192 U. S. 418, 427.

[5] Pullman's Car Co. *v.* Pennsylvania, 141 U. S. 18; Western Union, etc. Co. *v.* Massachusetts, 125 U. S. 530, 552.

[6] Philadelphia, etc. Steamship Co. *v.* Pennsylvania, 122 U. S. 326; Galveston, etc. R. Co. *v.* Texas, 210 U. S. 217. These cases overrule an earlier case upholding such a tax. See State Tax on Railway Gross Receipts, 15 Wall. (U. S.) 284. "It would seem to be rather metaphysics than plain logic for the state officials to say to the company: 'We will not tax you for the transportation you perform, but we will tax you for what you get for performing it.' Such a position can hardly be said to be based on a sound method of reasoning." Philadelphia, etc. Steamship Co. *v.* Pennsylvania, *supra*, at p. 336, *per* Mr. Justice Bradley. The application of this to the principal case seems clear.

[7] Maine *v.* Grand Trunk R. Co., 142 U. S. 217; New York *v.* Roberts, 171 U. S. 658.

[8] See 24 HARV. L. REV. 563. "While the mere declaration contained in a statute that it shall be regarded as a tax of a particular character does not make it such if it is apparent that it cannot be so designated consistently with the meaning and effect of the act, nevertheless the declaration of the lawmaking power is entitled to much weight, and in this statute the intention is expressly declared to impose a special excise tax with respect to the carrying on or doing business by such corporation. . . ." Flint *v.* Stone Tracy Co., 220 U. S. 107, 145, *per* Mr. Justice Day.

[9] 36 STAT. AT L. 112.

[10] Flint *v.* Stone Tracy Co., *supra*.

[11] "The distinction between a tax 'equal to' one per cent of gross receipts, and a tax of one per cent of the same, seems to us nothing, except where the former phrase is the index of an actual attempt to reach the property, and to let the interstate traffic and the receipts from it alone. . . . This is merely an effort to reach the gross receipts, not even disguised by the name of an occupation tax, and in no way helped by the words 'equal to.'" Galveston, etc. R. Co. *v.* Texas, *supra*, at p. 227, *per* Mr. Justice Holmes. See GRAY, LIMITATIONS OF TAXING POWER, 38.

[12] "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration." U. S. CONST., AMENDMENT 16.

[13] Pollack *v.* Farmers Loan, etc. Co., 158 U. S. 601. This case decided that income

taxation of incomes as such.[14] And, as an income tax, it is indistinguishable from the *Gross Income Cases* — in substance, by taxing the proceeds of exports it is taxing the exports themselves. The effect of such a tax is either to shift the burden to the consumer, to reduce the volume of exports through a rise in price, or to leave the burden on the exporter — all dependent on the elasticity of the demand for the particular commodity, and the extent to which outside competition is possible.[15] In any case, this indirect effect is reached through the medium of a tax on exports.

Assuming, then, that the tax in *Peck & Co.* v. *Lowe* is an export tax, still perhaps the Sixteenth Amendment by its broad language abrogates the constitutional prohibition against such a tax, in so far as it is laid on the income derived from exports. If it has such an effect, the case is obviously correct, but as yet no judicial opinion has been handed down on either side;[16] the court in the principal case assumes that it does not have this effect, but expressly refuses to decide the question, reaching its decision by holding that the tax is not an export tax — a result with which we disagree. Since the amendment does not in terms repeal the constitutional prohibition, the repeal, if any, must be by implication. Repeals by implication are not favored, unless the earlier provision is so inconsistent with the later that the two cannot stand together.[17] But there seems to be a clear repeal by the Sixteenth Amendment; if incomes, "from whatever source derived," may be taxed, a prohibition against taxing exports (assuming that such a tax would be an export tax) is utterly inconsistent with the amendatory provision, and is consequently repealed thereby. The principal case may be sustained upon this ground.

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taxes on realty and personalty were direct taxes, and unconstitutional unless apportioned.

[14] The present income tax taxes all persons, and so cannot be considered as an excise tax; it is not applied solely to corporations and the like, as was the tax of 1909. The provision as to corporations is a part of the whole and cannot be separated therefrom, and that whole is clearly a tax on income. In addition, the tax of 1909 specifically declared the imposition of an excise; the present tax is expressly laid on incomes without more qualification as to its purpose.

[15] See BASTABLE, PUBLIC FINANCE, 3 ed., 571.

[16] There is great diversity of opinion as to whether the amendment renders the income from state bonds, formerly exempt from federal taxation, open to the income tax. The answer depends upon whether the amendment be construed to open to taxation income from all sources, income from exports among them. See (in accord with such construction): STATE PAPERS OF GOV. HUGHES, 1910, quoted in FOSTER, INCOME TAX, 2 ed., par. 27; Opinion of Ex. Sen. Edmunds, 45 CONG. RECORD, 1957. See (*contra* such construction) Letter of Sen. Root, N. Y. WORLD, 1 March, 1910, quoted in FOSTER, INCOME TAX, 2 ed., par. 27.

[17] U. S. *v.* Greathouse, 166 U. S. 601, 605. See 1 SUTHERLAND, STATUTORY CONSTRUCTION, 2 ed., par. 247; SEDGWICK, STATUTORY AND CONSTITUTIONAL LAW, 97.